79-1808

Supreme Court, U.S.
FILED
MAY 13 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1529

ROBERT VERNE BONFOEY,

Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1529

ROBERT VERNE BONFOEY,

Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 16, 1980.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, granting Respondent's motion for summary judgment is printed in Appendix C hereto and is not reported. The opinion of the Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court for the Northern District

of Texas, Dallas Division, is printed in Appendix A hereto, and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, was entered on January 16, 1980. The Court of Appeals for the Fifth Circuit denied Petitioner's petition for rehearing by Order entered on February 13, 1980, which is printed in Appendix B hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE QUESTION PRESENTED

When state law is to be applied in a federal diversity case and the federal district court hearing the case is not a district court in the state or district whose law is to be applied and the recent decisions from the courts of the state reflect a developmental trend in the area under consideration, is it an improper exercise of judicial federalism for the court of appeals to fail to utilize the available certification procedure to properly determine the state's law on the issue being appealed?

STATUTE INVOLVED

The Alabama statute providing of the certification procedure to the Alabama Supreme Court is Alabama Constitution Article 6, §140(b)(3). This provision is printed in Appendix D hereto.

STATEMENT

Petitioner is an individual who filed suit in the United States District Court for the Northern District of Texas,

Dallas Division, against Unionmutual Stock Life Insurance Company of America (hereinafter called "Unionmutual") and the Equitable Life Assurance Society of the United States, the Respondent herein. Jurisdiction in the federal courts is predicated on diversity of citizenship. Petitioner's lawsuit is an action for long-term disability insurance benefits under a group policy which was issued to Petitioner's employer and which covered Petitioner while he was employed in Alabama. Alabama's insurance law governs Petitioner's case.

A. Basis of Petitioner's Cause of Action.

Petitioner contended in his lawsuit that certain theories of estoppel and waiver were applicable under Alabama insurance law to bring him within certain provisions of the insurance policies sued upon. In particular, Petitioner alleged that his employer in Alabama had acted as the insurers' agent with respect to Petitioner and as a result of the employer's intentional conduct, the waiting period condition and the "actively at work" provisions of the policies were waived and the insurer was promissorily estopped to assert certain defenses to Petitioner's claim. Petitioner presented competent evidence on these issues to the District Court.

B. The District Court's Action.

The United States District Court for the Northern District of Texas, Dallas Division, Judge Robert W. Porter presiding, granted summary judgment in favor of Unionmutual on January 26, 1977. Petitioner did not appeal from that judgment.

The District Court later granted summary judgment in favor of Respondent on February 1, 1978. In essence, the District Court's opinion for summary judgment was not predicated upon the failure of Petitioner to produce sufficient evidence on Petitioner's waiver and estoppel grounds, but was based upon the District Court's opinion that waiver and estoppel theories could not enlarge the coverage of insurance policies under the District Court's interpretation of Alabama insurance law. Petitioner duly perfected his appeal from that judgment to the Court of Appeals for the Fifth Circuit.

C. Proceedings in the Court of Appeals.

The Court of Appeals for the Fifth Circuit considered Petitioner's appeal, but affirmed the judgment of the District Court. The Court of Appeals specifically denied Petitioner's argument that the actively at work condition and the waiting period provision of the policy could be waived. On the same basis as the District Court, it concluded that Petitioner's theories of waiver and estoppel could not apply to these provisions because they would enlarge the coverage of insurance policies contrary to its interpretation of Alabama insurance law.

Petitioner filed his petition for rehearing requesting that the Court of Appeals certify certain legal questions regarding his estoppel and waiver theories to the Alabama Supreme Court to obtain a definitive statement regarding how it would rule on these previously undetermined issues of Alabama insurance law. Petitioner's petition for rehearing was summarily denied by order dated February 13, 1980.

REASON FOR GRANTING THE WRIT

This petition raises an important question of appellate procedure. Although Petitioner's basic cause of action is not constitutionally or publicly significant, his case does present a significant procedural point which impacts on most federal diversity actions. The appropriate rule or appellate standard which Petitioner seeks to establish is that the Courts of Appeal are duty-bound to freely certify questions of state law (if such procedure is available to them) to the appropriate state court especially when the federal district court from which the appeal arose does not sit in the state whose law is being applied and especially in situations where the underlying state law is in a period of recent development.

In Petitioner's case the Texas federal district court applied a much-used, but very vague, quotation from several Alabama cases to-wit: "waiver and estoppel cannot enlarge the coverage of insurance policies." The Texas federal district court and the Court of Appeals applied this relatively simple phrase to all of the provisions of the policy to which Petitioner was asserting his theories of waiver or estoppel. Neither Court cited any Alabama decision holding that these specific types of policy provisions were related to insurance risks or coverage. In fact, Petitioner presented competent summary judgment evidence that the waiting period condition of the policy (in excess of 30 days) was not premium related but was merely a feature of the policy which facilitated the employer's self-administration of the policy for its employees. Both lower courts undoubtedly thought they were properly applying the

applicable Alabama law, which they had a duty to do under *Erie Railroad Co. vs. Thompkins,* 304 U.S. 64 (1938).

Petitioner has filed this writ of certiorari because he does not believe that the Texas District Court nor the Court of Appeals applied Alabama law to his case, as the Alabama Supreme Court would have determined it to be.

Just prior to Petitioner's appeal there had been two recent developments in Alabama insurance law which related to the issues in Petitioner's cause. First, Alabama law had just recently addressed the group insurance agency question and had adopted the minority position on this point, to the effect that an employer could be the agent for the insurer in self-administered policy situations. *Blue Cross-Blue Shield of Alabama vs. Thornton,* 325 So.2d 187 (Ala. Civ. App. 1975). Second, Alabama law had just recently recognized the theory of promissory estoppel to provide coverage in the insurance field. *United States Fidelity & Guaranty Co. v. McKinnon,* 356 So.2d 600 (Ala. Sup. 1978). These were significant developments in Alabama's insurance law and reflected a modern and liberal trend to these issues. The implications of these decisions significantly discredit the prior Alabama law in this area, which was the basis of the District Court's and the Court of Appeal's judgments. At a minimum, the state of the Alabama insurance law in this area was uncertain at this time. In the face of this uncertain state of the law, the District Court sitting in Texas and the Court of Appeals sitting in Louisiana determined what Alabama's law was, or should be, on these points, all without the benefit of

Alabama's determination of same and, notwithstanding the certification procedure available to the Court of Appeals.

Certainly the certification process which many states have afforded the federal courts, and in this instance Alabama's certification statute, is a plea to the federal courts to let the states determine their law in a consistent and dynamic way. Obviously, the states with such statutes do not consider it to be a burden when called upon to assist the federal courts in determining their state law. By utilizing the certification procedure, the burden of correctly applying relatively uncertain or rapidly developing state law is alleviated from the federal courts. A definitive standard for utilizing this beneficial procedure should be pronounced by this Supreme Court.

Petitioner's case was a prime candidate for certification and yet it was not certified. It is Petitioner's opinion that as a result of the Court of Appeal's failure to certify issues in his case, at this critical developmental stage of Alabama's insurance law, that these federal courts have applied, and will be applying in the future, Alabama law which is a step behind the actual trend of the law on these issues in the State of Alabama.

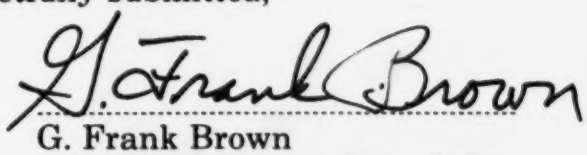
This Court has previously announced its favor of the certification procedure in the situation where a federal district court attempts to apply the law of a state which is foreign to the state or district in which the federal court is sitting. *Bishop vs. Wood,* 426 U.S. 341, 345-346 (1976). This Court should now further instruct the Courts of

Appeal to freely utilize the certification procedure available to them when a state's law has made a recent change in direction or development, or has entered into a previously uncharted area of the law in that state. This is a minimum requirement if the federal courts are to properly exercise their *Erie* duties. As state law becomes more dynamic in these changing times, it is of public importance that the federal courts be instructed to turn to the invaluable tool, the certification procedure, to properly keep pace with the state's law, and thus to energize the *Erie* doctrine to its fullest potential.

CONCLUSION

This petition for certiorari should be granted so that fundamental justice may be done.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Mr. Larry M. Lesh, Locke, Purnell, Boren, Laney and Neely, 3600 Republic National Bank Tower, Dallas, Texas 75201, this 9th day of May, 1980.

G. Frank Brown

G. Frank Brown

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1529

ROBERT VERNE BONFOEY,
Plaintiff-Appellant,

versus

UNION MUTUAL STOCK LIFE
INSURANCE CO. OF AMERICA,
Defendant,

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before MORGAN, REAVLEY AND HATCHETT, Circuit Judges. HATCHETT, Circuit Judge:

In this diversity case the appeal is from an order of summary judgment in favor of the appellee-insurer granted on grounds that the appellant's disability is excluded from the coverage of the policy in dispute. We affirm.

Appellant, Robert Bonfoey, began employment with Jack's Food Systems (Jack's) on July 22, 1974. On September 17, 1974, he was hospitalized because of a heart ailment. He returned to work at Jack's on January 6, 1975. His heart ailment subsequently led to his

disability, which commenced on November 6, 1975.

On July 22, 1974, when appellant began work, Jack's held a long term disability policy issued by Unionmutual, covering "all salaried officers, administrative and managers." The policy provides for a ninety day waiting period before it becomes effective. Additionally, it provides that coverage will not become effective after the ninety day waiting period unless the employee is actively at full-time work. Excluded from coverage is any disability commencing during the first twelve months the insurance is in force, if the disability is caused by a disease or ailment contracted or treated during the three month period prior to the effective date of insurance.[1]

On May 1, 1975, Jack's terminated the Unionmutual policy and placed all of its group insurance with Equitable Life Assurance Society of the United States (Equitable). The Equitable policy contained a two year pre-existing condition exclusion for any disability which manifested itself within twelve months prior to the effective date of insurance.[2] Equitable also agreed to cover any disability which would have been covered by the Unionmutual policy. This action was brought to determine appellant's entitlement to disability insurance benefits under the policies held by Jack's.

The trial court found that the appellant's disability was not covered by the Unionmutual policy because his coverage did not become effective until January of 1975, when he actually returned to the office. The trial court concluded that the disability, therefore, occurred during the first twelve months the insurance was in effect; and

because the disability resulted from an ailment contracted within the three month waiting period, it was within the policy's excluison. The trial court further concluded that although officers of Jack's told the appellant he was covered, this was insufficient to enlarge the coverage of the policy. Summary judgment was granted for the appellee. Our task is to review the trial court's grant of summary judgment for correctness.

Appellant asserts that the trial court erred in granting summary judgment in favor of the appellee because material issues of fact were presented by the pleadings. The appellant argues that Jack's, as Unionmutual's agent, effectively waived the ninety day eligibility waiting period of the policy. Appellant also contends that Jack's, as Unionmutual's agent, waived the "actively at work condition" of the policy based upon Unionmutual's retention of premiums during the period he was allegedly not covered. Appellant further argues that performance of certain of his regular work created a fact issue as to when he returned to work within the meaning of the policies.

A motion for summary judgment should be granted only if there is no genuine issue as to any material fact and the moving party, as a matter of law, is entitled to judgment. Fed.R.Civ.P. 56(c). *See. e.g., Aulds v. Foster,* 484 F.2d 945 (5th Cir. 1973). This court has cautioned against use of summary judgment procedure in cases for which it is not designed. *XRT, Inc. v. Krellenstein,* 448 F.2d 772 (5th Cir. 1971). 'Summary judgments are looked upon with favor" where there are no genuine issues of

material fact and the moving party is entitled to judgment as a matter of law. *Bruce v. Travelers Insurance Co.*, 266 F.2d 781, 786 (5th Cir. 1959); *United States for Use of Edward E. Morgan Co. v. Maryland Casualty Co.*, 147 F.2d 423, 425 (5th Cir. 1945).

The pivotal issue involves determining the effective date of the insurance. If the policy is enforced as written, it is clear that appellant's disability is not covered. This is because the policy expressly excludes any disability commencing during the first twelve months the insurance is in effect, if the disability is caused by a disease contracted or treated during the ninety day period prior to the effective date of insurance. Under the policy, there was a ninety day waiting period wherein the coverage did not become effective unless the employee was actively at work. The trial court concluded that the appellant did not return to active work for purposes of the policy, until January 6, 1975, when he actually returned to the office at Jack's. This finding is in accord with Alabama law. *See White v. Massachusetts Mutual Life Insurance Co.*, 157 So.2d 6 (Ala. 1963). Thus, the disability which commenced within twelve months of appellant's return to active full-time work was excluded from the contract as written.

Appellant argues that because Jack's told him that he was covered immediately upon being employed, the effective date of insurance was July 22, 1974. We find that the trial court correctly concluded that no genuine issue of material facts was presented by this undisputed allegation. Under Alabama law, Jack's clearly had no

authority to enlarge or expand the coverage of the Unionmutual policy. *Aetna Insurance Co. v. Pete Wilson Roofing & Heating Co., Inc.*, 272 So.2d 232 (Ala. 1972). The present record is devoid of any evidence showing that the officers of Jack's were agents of Unionmutual, other than for the collection of premiums and administration of the policies. In *Liberty National Life Insurance Co. v. Staggs*, 6 So.2d 432 (Ala. 1942), the Alabama Supreme Court stated:

> We have recognized the general rule that an agent whose authority is limited to soliciting insurance, delivering policies, and collecting premiums has no power to change stipulations in a contract of insurance: that to do so he must either be a general agent or be specially so authorized or his course of dealing to that extent have been ratified expressly or impliedly.

6 So.2d at 433.

The court went on to state: "And for like reasons such an agent cannot make a binding contract of insurance or to insure." *Id.* Further, the policy contains a provision stating that no agent has authority to change or waive the provisions of the policy. This provision is valid and enforceable under Alabama law. *First National Life Insurance Co. of America v. Rector*, 142 So. 392 (Ala. 1932).

Appellant's contention that Jack's, as Unionmutual agent, waived the "actively at work condition" of the policy based upon Unionmutual's retention of premiums during the period he was not covered, is without merit. It is well-established in Alabama law that theories of waiver and estoppel cannot extend or enlarge the

coverage of an insurance policy. *Aetna Insurance Co. v. Peter Wilson Roofing & Heating Co., Inc.*, 272 So.2d 232 (Ala. 1972).

The appellant has failed to establish the presence of factual issues. We hold the grant of summary judgment to be proper; accordingly, the judgment is affirmed.

AFFIRMED.

FOOTNOTES

[1] The Unionmutual policy provided in pertinent part:

> EFFECTIVE DATES OF INSURANCE: . . .
> The insurance of any eligible employee shall become effective on:
>
> (1) Such employee's 'eligibility date' as hereinafter defined, providing he makes application for the insurance on or before such date . . .
>
> The eligibility date for any employee, as used herein, means the date upon which the employee first became eligible for insurance under this Policy in a particular class, as set forth in the Application herefor . . . .
>
> * * *
>
> Notwithstanding the foregoing, no insurance shall become effective on a date when an employee is not actively at full-time work because of a disability resulting from sickness or injury. In such case, the insurance shall not become effective until the next following day upon which such employee is actively at work within his eligible class.
>
> * * *
>
> EXCLUSIONS: This policy does not cover:
>
> (a) any disability commencing during the first twelve months that the insurance is in force with respect to the Employee if the disability is caused or contributed to by, or is a consequence of, a disease or injury for which the Employee received medical treatment, or services, or took prescribed drugs or medicines during the three month period immediately prior to the effective date of such insurance. . . .

The provision for the 90 day waiting period for eligibility was contained in Jack's application for the policy. However, the policy provided that: "ENTIRE CONTRACT-CHANGES: This policy, the application of the Policyholder and any individual application, a copy of which has been provided to the individual, constitute the entire contract between the parties. . . ."

[2] The Equitable policy provided in part that:

> No benefits shall be payable under this policy . . .
>
> . . . .
>
> 5. for a period of disability commencing within the first two years after the effective date of the employer's insurance under this policy if such disability is caused or contributed to by injury occurring or sickness contracted prior to such effective date or by any condition related to such injury or sickness and such injury, sickness or related condition manifested itself within twelve months prior to such effective date. . . .

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1529

ROBERT VERNE BONFOEY,
Plaintiff-Appellant,

versus

UNION MUTUAL STOCK LIFE
INSURANCE CO. OF AMERICA,
Defendant,

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
(February 13, 1980)

Before MORGAN, REAVLEY and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Joseph W. Hatchett
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-76-0920-F

ROBERT VERNE BONFOEY

versus

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES

ORDER

Defendant The Equitable Life Assurance Society of the United States has moved for summary judgment on the grounds that the Plaintiff's disability is excluded from the coverage of the Defendant's policies and that coverage cannot be enlarged by waiver or estoppel. Summary judgment has previously been entered denying recovery against Union Mutual Life Insurance Company, originally named as a party defendant.

The uncontroverted facts show the following: On October 1, 1973, Unionmutual issued policy No. 51072 to Jack's Food Systems, Inc. The policy excluded from coverage:

> (a) any disability commencing during the first twelve months that the issuance is in force with respect to the Employee if the disability is caused or contributed to by, or is a consequence of, a disease or injury for which the Employee received medical treatment, or services, or took prescribed drugs or medicines during the three month period

> immediately prior to the effective date of such insurance . . .

Plaintiff was employed on July 22, 1974. Under the terms of the Unionmutual policy he would have become eligible for coverage on October 22, 1974. The Plaintiff, however, was told by his employer that the long term disability coverage with Unionmutual was effective immediately. On September 17, 1974, within the ninety day waiting period, the Plaintiff was hospitalized for a heart ailment. The ailment subsequently led to the Plaintiff's disability which is the basis for this cause of action. In May of 1975 Jack's Food Systems, Inc. terminated prior coverage and placed all of its group insurance with Equitable, including policy No. 19794LT effective May 1, 1975, which provided long term disability benefits for employees of Jack's Food Systems, Inc. The Equitable policy provided that no benefits were payable thereunder:

> [F]or a period of disability commencing within the first two years after the effective date of the employee's insurance under this policy if such disability is caused or contributed to by injury occurring or sickness contracted prior to such effective date or by any condition related to such injury or sickness and such injury, sickness or related condition manifested itself within twelve months prior to such effective date.

Equitable, however, contractually agreed to cover any disability which would have been covered by the Unionmutual policy.

The Plaintiff, based on his belief that he was covered under the Unionmutual policy, and therefore under the

Equitable policy, filed a claim for benefits with Equitable. Equitable representatives, predicated upon the assurances of the Plaintiff that he was covered by the Unionmutual policy, advised the Plaintiff that his disability was covered by the Equitable policy. Equitable subsequently denied coverage and Plaintiff brought this action.

Plaintiff instituted this action on July 7, 1976 and established diversity jurisdiction under 28 U.S.C. §1332. Plaintiff alleges that the Defendant Equitable has wrongfully denied coverage and refused to pay benefits under the above mentioned insurance policies. All parties agree that Alabama law controls this case.

The Plaintiff's claim turns on whether he was covered under the Unionmutual policy, and therefore under the Equitable policy. Because the disability was a consequence of an ailment which was contracted within the three month waiting period, liability depends on whether the disability occurred within twelve months after the effective date of the insurance with respect to the Plaintiff. This in turn requires a determination of when the Unionmutual coverage became effective as to the Plaintiff. Ordinarily the effective date would have been October 22, 1974, three months from the date of employment.

The Unionmutual policy, however, provided that:

> [N]o insurance shall become effective on a date when an employee is not actively at full time work because of a disability resulting from sickness or injury. In such case, the insurance shall not become effective until the next following day upon which such

employee is actively at work . . .

Plaintiff was not "actively at full time work" on October 22, 1974 and did not return to his office until January of 1975.

Equitable denies coverage under the Unionmutual policy because the disability arose from an ailment contracted during the three-month waiting period; therefore any disability arising from the ailment would be excluded if the disability commenced within the first twelve months that the insurance was in force with respect to the employee. Equitable alleges that under the terms of the contract the insurance did not become effective with respect to the Plaintiff until January of 1975 when he returned to the office and was actively at full-time work. Because the disability occurred before January, 1976, the disability fell within the exclusion from coverage provision contained in the Unionmutual policy. The Plaintiff, however, alleges that Jack's Food Systems, Inc. was the agent for the insurer, Unionmutual, in dealing with Jack's employees; and that Jack's, in that capacity, waived with respect to the Plaintiff, the waiting period and/or "actively at full-time work" requirements of the Unionmutual policy. Alternatively, Plaintiff argues that by working at home he satisfied the return to work requirement prior to November 6, 1974, and therefore, his disability, which he claims occurred on November 6, 1975, did not occur within twelve months of the effective date of the insurance, and was covered by the Unionmutual policy.

Plaintiff's arguments fail because his disability does

not fall within the coverage of either the Equitable policy or the Unionmutual policy; and that coverage cannot be enlarged by waiver or estoppel. I find that Plaintiff's disability was not covered by the Equitable policy because it was caused by an ailment which was contracted within twelve months preceeding May of 1975, the effective date of that policy. I additionally find that the Plaintiff's disability was not covered by the Unionmutual policy because his coverage did not become effective until January of 1975, when he actually returned to the office. Under Alabama law the Plaintiff's work at home did not satisfy the return to full time work requirement for the commencement of insurance coverage under the Unionmutual policy. *White v. Massachusetts Mutual Life Ins. Co.,* 157 So.2d 6 (Ala. 1963). The disability, therefore, occurred during the first twelve months the insurance was in force; and because it was caused by an ailment contracted within the three month waiting period, was within the exclusion from coverage.

Despite the fact that officers of Jack's Food Systems, Inc. and employees of Equitable stated that the Plaintiff's disability was covered, I find that under Alabama law, waiver and estoppel cannot enlarge the coverage of insurance policies. *Aetna Ins. Co. v. Pete Wilson Roofing and Heating Co., Inc.,* 272 So.2d 232 (Ala. 1972); *Alabama Farm Bureau Mutual Casualty Ins. Co. v. Adams,* 267 S.2d 151 (Ala. 1972).

Accordingly, on these grounds, the motion for

summary judgment will be, and hereby is GRANTED as to the Defendant.

It is so ORDERED.

Robert W. Porter
United States District Judge

DATE February 1, 1978

APPENDIX D

Certified questions from federal courts.

(a) *When certified.* When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court may certify such questions or propositions of law of this state to the supreme court of Alabama for instructions concerning such questions or propositions of state law, which certified question the supreme court of this state, by written opinion, may answer.

(b) *Jurisdiction.* Questions or propositions of law referred to in subdivision (a) hereof shall be certified for answer to the supreme court.

(c) *Method of invoking rule.* The provisions of this rule may be invoked by any of the federal courts upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

(d) *Contents of certificate.* The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

(e) *Preparation of certificate.* The certificate shall be certified to the supreme court by the clerk of such federal court and under its official seal. The supreme court may, in its discretion, require the original or copies of all or any

portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said certified question.

(d) *Costs.* The costs of the proceedings shall be equally divided between the parties unless otherwise ordered by the supreme court.

(g) *Briefs and argument.* The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 28 days (four weeks) after the filing of said certificate in the supreme court. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 21 days (three weeks) after the receipt of the appellant's or moving party's brief and a reply brief may be filed within seven days (one week) thereafter.

(h) *Oral argument.* Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.

Supreme Court, U. S.
FILED
JUN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1808

ROBERT VERNE BONFOEY,
Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1808

ROBERT VERNE BONFOEY,

Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To: THE HONORABLE SUPREME COURT OF THE UNITED STATES

Respondent, The Equitable Life Assurance Society of the United States (hereinafter called "Equitable"), presents this its Respondent's Brief in Opposition to the Petition for Writ of Certiorari of Petitioner, Robert Verne Bonfoey (hereinafter called "Bonfoey").

OPINIONS, STATUTES AND JURISDICTION

The opinions of the courts below, the statutes involved in this case, and the jurisdiction of the Court are contained in Bonfoey's Petition.

QUESTION PRESENTED

Bonfoey contends that the state law applicable to the case at bar is uncertain[1] because of a conflict created by two recent Alabama court decisions.[2] The decisions cited, however, are neither applicable to the case at bar nor in conflict with the established state law. Therefore, the question presented to this Court should be: When in a diversity suit a circuit court of appeals is requested to certify to a state supreme court, pursuant to a state certification statute, certain legal questions which are settled by the courts of that state, is it an abuse of the circuit court of appeals' discretion to deny the request?

STATEMENT OF THE CASE

Bonfoey's statement of the case is substantially correct.

STATEMENT OF THE FACTS

Equitable adopts the facts as contained in the opinion of the Court of Appeals for the Fifth Circuit as the correct statement of facts and presents the following fact summary from that opinion for purposes of emphasis and clarification.[1]

Under the terms of the Unionmutual policy for which Equitable had assumed responsibility, Bonfoey could not recover for his disability.[2] Nevertheless, Bonfoey sought recovery alleging that officers of Jack's, acting as agents for Unionmutual, had waived the "waiting

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[1] Bonfoey's Petition, pg. 2.

[2] Bonfoey's Petition, pg. 6.

[1] The opinion of the Circuit Court of Appeals is printed in the Appendix A of the Petition.

[2] Pet. App. A; pg. A-4.

period" and "actively at work" conditions.[3] Bonfoey made this contention even though: 1) The officers of Jack's had, at most, authority to collect premiums and administer the policies;[4] 2) neither insurance company had conducted itself in a manner which would suggest that the officers of Jack's possessed any greater authority;[5] and 3) the Unionmutual policy had expressly stated that no agent had authority to change or waive any provision of the policy.[6]

REASONS FOR DENYING THE WRIT

1. *The state law applicable to the case at bar is clear and well established, and was fairly and accurately applied by the Court of Appeals.*

Under established Alabama law, the coverage of an insurance policy cannot be modified or enlarged by an agent of the insurer who does not have the requisite authority to make such a change. *Security Life & Trust Co. v. Galin*, 193 So.2d 766 (Ala. 1966). As the Supreme Court of Alabama stated in *Liberty National Life Insurance Co. v. Staggs*, 6 So.2d 432 (Ala. 1942):

> We have recognized the general rule that an agent whose authority is limited to soliciting insurance, delivering policies and collecting premiums has no power to change stipulations in a contract of insurance; to do so he must be either a general agent or be specifically authorized or his course of dealing to that extent have been ratified expressly or impliedly.

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[3] *Id.* at pg. A-3.
[4] *Id.* at pg. A-5.
[5] *Id.*
[6] *Id.*

6 So.2d at 433. Thus, under Alabama law, an agent's ability to alter a contract of insurance is directly dependent upon the authority he possesses.

Equally well settled in Alabama is the principle that an agent's apparent authority is determined by the conduct of the principal, rather than the acts of the agent. *Pearson v. Agricultural Ins. Co. of Watertown, N.Y.*, 25 So.2d 164 (Ala. 1946). In *Johnson v. Shenandoah Life Ins. Co.*, 281 So.2d 636 (Ala. 1973), the Alabama Supreme Court stated the rule as follows:

> The doctrine of apparent authority does not rest upon what one thinks an agent's authority may be, or what the agent holds out his authority to be; rather, the doctrine of apparent authority is based on the principal's holding the agent out to a third person as having the authority under which he acts . . .
>
> The apparent power of an agent is to be determined by the acts of the principal, and not the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct and statements have created the apparent authority . . .

281 So.2d at 640.

In the case at bar, the officers of Jack's, at most, had authority to collect premiums and administer the policies. No conduct was shown which would suggest that either Unionmutual or Equitable clothed these officers with greater authority. To the contrary, the Unionmutual policy expressly stated that no agent had authority to waive any of the provisions of the insurance

contract. The case at bar therefore, falls squarely within the rule announced in *Staggs, supra:*

> An agent whose authority is limited to soliciting insurance, delivering policies and collecting premiums has no power to change stipulations in a contract of insurance . . .

6 So.2d at 433. Thus, the Fifth Circuit correctly ruled, on the basis of well established state law, that the officers of Jack's had no actual or apparent authority to waive the "waiting period" or "actively at work" requirements of the policy. Moreover, the Fifth Circuit's holding is consistent with the established principle in Alabama law that coverage under an insurance policy cannot be enlarged or expanded on theories of waiver and estoppel. *Aetna Ins. Co.* v. *Pete Wilson Roofing & Heating Co., Inc.*, 272 So.2d 232 (Ala. 1972).

Bonfoey contends, however, that two recent state court decisions create doubt with regard to the applicable state law involved in the case at bar.[1] The argument is without merit because neither decision is applicable.

In *Blue Cross-Blue Shield of Alabama v. Thornton*, 325 So.2d 187 (Ala. Civ. App. 1975), the court found, on the basis of the insurer's acquiescence, that an employer holding a group insurance plan for the benefit of his employees had authority to collect and forward employee premiums to the insurer.[2] The court concluded that since the employer had authority to collect these premiums, the insurer was estopped from denying coverage to an employee who had paid the premium to his employer, but the employer had failed to forward the premium to the insurer.[3] Thus, *Thornton* stands for

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[1] Pet., pg. 6.

[2] 325 So.2d at 191-192.

[3] *Id.* at 193.

the proposition that an agent with apparent authority to perform certain acts can bind his principal when he acts within that authority. In the case at bar, the officers of Jack's only had authority to collect premiums and administer the policies. Such authority clearly did not encompass the waiving of policy provisions. Therefore, *Thornton* is inapplicable because the officers of Jack's did not act within their apparent authority.

In *United States Fidelity and Guaranty Co. v. McKinnon*, 356 So.2d 600 (Ala. 1978), the second case cited by Bonfoey,[4] a local insurance agent working out of the insurer's branch office told the "insured," with knowledge that the "insured" was not covered by the policy, that she was included in the coverage. Affirming the jury findings in the lower court, the Supreme Court of Alabama stated that "an agency relationship" existed between the insurer and the local agent; that the knowledge possessed by the local agent was therefore "imputed" to the insurer;[5] and that, on the basis of this agency relationship, the insurer was estopped from denying coverage to the "insured."[6] *McKinnon* is accordingly based on a theory that a general agency relationship existed between the employee of the local agency and the insurer, and as a consequence, it would be within the local agent's authority to make representations of coverage.

Such a theory is consistent with the established Alabama law stated in *Liberty National Life Ins. Co. v. Staggs, supra:*

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[4] Pet. pg. 6.

[5] 356 So.2d at 606.

[6] *Id.*

> . . . to change stipulations in a contract of insurance [the agent] . . . must be either a general agent or be specifically authorized or his course of dealing to that extent have been ratified expressly or impliedly.

6 So.2d at 433.

In the case at bar, the officers of Jack's were not general agents of Unionmutual or Equitable; they were, at most, special agents with limited authority. The *McKinnon* holding, dealing with general agency, is therefore inapplicable.

In short, the Alabama law applicable to the case at bar is clear and well settled. The Fifth Circuit appropriately applied the correct law, and in doing so, fulfilled the requirements established by this Court in *Erie*.[7]

2. *The Fifth Circuit correctly exercised its discretion in denying Bonfoey's request for certification.*

This Court stated in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), that the use of a state's certification statute "rests in the sound discretion of the federal court."[8] The opinion in that case suggested that such factors as the novelty of the question, the clarity of the local law, the concept of federalism, and the saving of time, energy, and resources should be considered in determining whether certification would be appropriate.[9]

In *State of Florida ex rel. Shevin v. Exxon Corporation*, 526 F.2d 226 (5th Cir. 1976), an opinion completely consistent with *Lehman, supra*, the Fifth Circuit wrote:

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[7] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[8] 416 U.S. at 391.

[9] *Id.* at 391-392.

> In determining whether to exercise our discretion in favor of certification, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law — statutes, judicial decisions, attorney general's opinions — to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

526 F.2d at 274-275.

Application of the foregoing principles establishes that the case at bar clearly was not appropriate for certification. First, the legal questions at issue were neither novel nor close. Second, because Alabama law is clear and well established, the lower courts could readily determine the applicable state law without violating traditional notions of comity and federalism. Finally, from a practical standpoint, the certifying process would have only served to increase delay[10] and the expenditure of resources by both the courts and the litigants.

Thus, the case at bar completely lacked the necessary elements for certification, and the Fifth Circuit correctly exercised its discretion in denying Bonfoey's certification request.

3. *It is irrelevant to the certification process that the federal court does not sit in the state whose law is to be applied.*

[10] This Court has emphasized the use of the certification procedure as a tool to speed up the termination of the proceeding. Bellotti v. Baird, 428 U.S. 132 (1976).

Because certification lies within the federal court's discretion[11] and may be ordered on the court's own motion,[12] the domicile of the federal court is unimportant; it is free to order certification whenever the state law is unsettled, unfamiliar or not readily determinable. Therefore, Bonfoey's suggestion that federal courts outside the state whose law is to be applied should be free to order certification[13] is meaningless; such is already the case, and no conflict among the circuits is alleged. Moreover, Bonfoey's citation of *Bishop v. Wood*, 426 U.S. 341 (1976), for the proposition that this Court favors certification by out-of-state federal courts,[14] is incorrect. The *Bishop* case does not even mention certification.

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[11] Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974).

[12] Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4248 (1978).

[13] Pet. pg. 7-8.

[14] Pet. pg. 7.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to opposing counsel, G. Frank Brown, 2001 Bryan Tower, Suite 3120, Dallas, TX 75201, by U.S. Mail on this the 6 day of June, 1980.

LARRY M. LESH